Supreme Court, U.S.
FILED
FEB 18 2003
CLERK

No. 02-948

IN THE

Supreme Court of the United States

JEFFERSON RANDOLPH CORPORATION,
dba JRC TRUCKING, INC. and
THURMAN CARPETS, INC.,

Petitioners,

v.

PROGRESSIVE DATA SYSTEMS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION

PETER H. STROTT
PETER H. STROTT, P.C.
Attorney for Respondents
14th Floor, Candler Building
127 Peachtree Street
Atlanta, Georgia 30303-1810
(404) 222-4340

179135

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether this Court has jurisdiction to consider the Petition for Certiorari where: (1) the Georgia Supreme Court correctly decided an issue of state law, interpreting the grounds for vacatur of an arbitration award available under the Georgia Arbitration Code, which interpretation did not draw into question the validity of any federal statute, treaty or Constitutional provision; and (2) Petitioners failed to preserve the alleged error for review?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Progressive Data Systems, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
Question Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	iv
Statement of Jurisdiction	1
Statutory Provision Involved in this Case	1
Statement of the Case	2
Reason for Denying the Petition	6
I. The Georgia Supreme Court Correctly Decided An Issue Of State Law, Interpreting The Georgia Arbitration Code, And Accordingly The Petition For Writ Of Certiorari Should Be Denied.	7
II. Petitioners Failed To Raise Or Litigate In The Lower Courts The Issue Of Whether The Georgia Supreme Court Should Have Applied The Federal Arbitration Act To This Proceeding And Thus They Waived Review Of This Issue.	9
Conclusion	10

TABLE OF CITED AUTHORITIES

Page

CASES

FEDERAL CASES

Black v. Cutter Laboratories, 351 U.S. 292, 100 L. Ed. 1188, 76 S. Ct. 824 (1956) 8

City of Springfield, Massachusetts v. Kibbe, 480 U.S. 257, 94 L. Ed. 2d 293, 107 S. Ct. 1114 (1987) .. 9-10

Coleman v. Thompson, 501 U.S. 722, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991) 8

Illinois v. Rodriguez, 497 U.S. 177, 111 L. Ed. 2d 148, 110 S. Ct. 2793 (1990) 7

Lambrix v. Singletary, 520 U.S. 518, 137 L. Ed. 2d 771, 117 S. Ct. 1517 (1997) 8

Lee v. Kemna, 534 U.S. 362, 151 L. Ed. 2d 820, 122 S. Ct. 877 (2002) 8

Southland Corp. v. Keating, 465 U.S. 1, 79 L. Ed. 2d 1, 104 S. Ct. 852 (1984) 10

STATE CASES

Southwire Co. v. American Arbitration Association, 248 Ga. App. 226, 545 S.E.2d 681 (Ga. App. 2001) 2, 3, 9

Cited Authorities

Page

STATUTES and RULES

28 U.S.C. § 1257 1

Supreme Court Rule 10 7

Supreme Court Rule 14 6

O.C.G.A. § 9-9-13 ..... 1, 2, 6

STATEMENT OF JURISDICTION

Respondents dispute that this Court has jurisdiction under 28 U.S.C. § 1257(a), as the Georgia Supreme Court decided solely a state law issue that did not draw into question the validity of any federal treaty, statute, or Constitutional provision.

STATUTORY PROVISION INVOLVED IN THIS CASE

The Georgia Supreme Court construed the Georgia Arbitration Code, and specifically O.C.G.A. § 9-9-13, which provides in pertinent part:

> (b) The award shall be vacated from the application of a party who either participated in the arbitration or was served with a demand for arbitration if the Court finds that the rights of that party were prejudiced by:
>
> > (1) Corruption, fraud or misconduct in procuring the award;
> >
> > (2) Partiality of an arbitrator appointed as a neutral;
> >
> > (3) An overstepping by the arbitrators of their authority or such imperfect execution of it that a final and definite award upon the subject matter submitted was not made; or

> (4) A failure to follow the procedures of this part, unless the party applying to vacate the award continued with the arbitration with notice of this failure and without objection.
>
> . . .
>
> (d) The fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

O.C.G.A. § 9-9-13.

STATEMENT OF THE CASE

Certain portions of Petitioners' statement of the case are not accurate and other relevant portions of the case have been omitted. Respondents do not concede Petitioners' version of the underlying dispute as accurate, but much of it is wholly irrelevant. Respondents will only address the relevant portions of the case, without waiver of their right to contest Petitioners' version.

Respondents did, as Petitioners' claim, initially contend that the Federal Arbitration Act applied to the dispute. Respondents maintained that position until the Georgia Court of Appeals issued its opinion in *Southwire Co. v. American Arbitration Association*, 248 Ga. App. 226, 545 S.E.2d 681 (Ga. App. 2001). After that decision, Respondents acknowledged that the Georgia Arbitration Code applied to the exclusion of the Federal Arbitration Act, and argued before the Georgia Court of Appeals and the Georgia Supreme Court that the arbitration award should be upheld under the Georgia Arbitration Code.

Petitioners, on the other hand never contended that the Federal Arbitration Act controlled this case or that the Federal Arbitration Act preempted the Georgia Arbitration Code. To the contrary, Petitioners contended throughout the case that the Georgia Arbitration Code applied, although they also argued in the alternative that under the Federal Arbitration Act they were still entitled to have the award vacated. Petitioners never disputed Respondents' contention that under *Southwire* the Georgia Arbitration Code applied.

The Georgia Court of Appeals did not decide the issue of whether the Georgia Arbitration Code was preempted by the Federal Arbitration Act, or even which arbitration code applied. Instead, the Georgia Court of Appeals stated that the parties appeared to agree to arbitrate under the Georgia Arbitration Code rather than the Federal Arbitration Act. The court did not decide the issue because it held that Georgia courts would not confirm an arbitration award that constituted a manifest disregard of the law. Based upon that analysis, the Georgia Court of Appeals wrongly determined that the arbitration award had to be reversed because, in the Court's view, the arbitrator manifestly disregarded the law.

As a result of that decision, Respondents sought review by Certiorari before the Georgia Supreme Court. In this petition, Respondents argued that the manifest disregard of the law standard for vacatur did not exist under the Georgia Arbitration Code. Respondents also acknowledged that the Georgia Arbitration Code controlled:

> During the case, there was never any agreement by the parties over whether the GAC or the FAA applied, and the parties argued under both. After the award, the Court of Appeals issued its decision in

> *Southwire Co. v. American Arbitration Association*, 2001 W.L. 170844 [248 Ga. App. 226, 545 S.E.2d 681] (Ga. App. 2001). There, the court held that the GAC applies if a contract has a Georgia choice of law clause, like the contract in the case at bar. After that decision, Petitioners [Respondents herein] conceded in their brief that the GAC applied.

Respondents' Petition for Certiorari to the Georgia Court of Appeals at 7 n.1.

In opposition, Petitioners argued that the arbitrator acted in manifest disregard of the law under both the Georgia Arbitration Code and the Federal Arbitration Act. Petitioners, however, never disputed Respondents' contention that the Georgia Arbitration Code applied and Petitioners never argued that the Federal Arbitration Act applied to the exclusion of the Georgia Arbitration Code or that it preempted the Georgia Arbitration Code.

The Georgia Supreme Court granted the Petition for Certiorari to consider:

> Whether a reviewing court may properly vacate an arbitration award due to the arbitrator's manifest disregard of the law. *See Green v. Hundley*, 266 Ga. 592 (1996); *City of Demorest v. City of Baldwin*, 251 Ga. App. 855 (2001); *Conmac Corp. v. Southern Diversified Development, Inc.*, 245 Ga. App. 895 (2000).

The three cases the Georgia Supreme Court cited were all Georgia Arbitration Code cases; none dealt with the applicability of the Federal Arbitration Act.

Respondents submitted their brief, arguing that manifest disregard of the law did not apply under the Georgia Arbitration Code. Petitioners responded that manifest disregard of the law applied under both the Georgia Arbitration Code and the Federal Arbitration Act. Petitioners did not contend that the Federal Arbitration Act applied to the exclusion of the Georgia Arbitration Code, or that the Georgia Supreme Court should apply the Federal Arbitration Act.

Respondents countered in their reply brief that Federal Arbitration Act authority was irrelevant to the issue before the Georgia Supreme Court. Petitioners followed with four supplemental briefs, but in these four briefs they never asserted that the Federal Arbitration Act should be applied.

The Georgia Supreme Court heard oral argument, and subsequently issued its opinion. The Georgia Supreme Court held that, "Inasmuch as the [Georgia Arbitration] Code does not list 'manifest disregard of the law' as a ground for vacating an arbitration award, it cannot be used as an additional ground for vacatur." *Progressive Data Systems, Inc. v. Jefferson Randolph Corp.*, 275 Ga. 420, 421, 568 S.E.2d 474, 475 (2002). In conclusion, the Georgia Supreme Court held:

> Our legislature set forth four statutory grounds for vacating an arbitration award. Significantly, it did not include "manifest disregard of the law" as one of those grounds. Whatever the merits of the "manifest disregard of the law" principle, we should not be so bold as to *judicially* mandate its use as an additional ground for vacatur, especially since, as noted above, our [Georgia] Arbitration

> Code is in derogation of the common law and must be strictly construed.

Id. Thus, the Georgia Supreme Court only construed the Georgia Arbitration Code under Georgia Law.[1] The validity of a federal statute, treaty or Constitutional provision was not questioned or otherwise implicated.

Petitioners moved for reconsideration following the Supreme Court's opinion. In that motion, Petitioners again failed to argue that the Georgia Supreme Court erred in not applying the Federal Arbitration Act. Instead, Petitioners only argued that the Georgia Supreme Court wrongly failed to apply manifest disregard of the law under the Georgia Arbitration Code.

REASON FOR DENYING THE PETITION

The Georgia Supreme Court decided an issue of Georgia law — that manifest disregard of the law did not apply under the Georgia Arbitration Code. This decision was correct, and addressed solely a state law issue — upon what grounds may an award be vacated under the Georgia Arbitration Code. To the extent any federal question was or should have been implicated, Petitioners did not raise the issue. Accordingly, there is no basis for review of the state law decision, and to the extent there is a basis, Petitioners waived review of the issue.

---

1. The decision was correct, as the Georgia Arbitration Code expressly allows an arbitrator to disregard the law. *See* O.C.G.A. § 9-9-13(d) ("The fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.").

I. The Georgia Supreme Court Correctly Decided An Issue Of State Law, Interpreting The Georgia Arbitration Code, And Accordingly The Petition For Writ Of Certiorari Should Be Denied.

As shown above, the Georgia Supreme Court decided a state law issue. The court did not consider whether the Federal Arbitration Act applied or whether it should apply, nor did it hold that the Federal Arbitration Act applied, but that a manifest disregard of law did not apply in the state court proceeding. The considerations governing review on certiorari of state court decisions are set forth in Supreme Court Rule 10:

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

See Supreme Court Rule 10.

This Court has repeatedly held that it will not review state court decisions that are based on state law. *See, e.g., Illinois v. Rodriguez*, 497 U.S. 177, 111 L. Ed. 2d 148, 110 S. Ct. 2793 (1990). Similarly, the Supreme Court will not take up a question of federal law even if presented in a state case if the decision of the state court rests on a state law

ground that is independent of the federal question and adequate to support the judgment. *See, e.g., Lee v. Kemna*, 534 U.S. 362, 151 L. Ed. 2d. 820, 122 S. Ct. 877 (2002). *See also Lambrix v. Singletary*, 520 U.S. 518, 137 L. Ed. 2d 771, 117 S. Ct. 1517 (1997); *Coleman v. Thompson*, 501 U.S. 722, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991).

In *Black v. Cutter Laboratories*, 351 U.S. 292, 100 L. Ed. 1188, 76 S. Ct. 824 (1956), this Court held that the scope of review of findings of an arbitration board under the California Arbitration Act was a matter exclusively for the court of that state, and was not a concern for the United States Supreme Court. *Id.* at 298, 76 S. Ct. at 827. The Court reiterated its prior holdings that it did not pass on federal questions discussed in opinions of state supreme courts, where it appeared that the judgment rested on adequate state grounds. *Id.* The Court dismissed the writ because:

> The decision involves only California's construction of a local contract under local law, and therefore no substantial federal question is presented. Moreover, even if the state court's opinion be considered ambiguous, we should choose the interpretation which does not face us with a constitutional question.

Id. at 299, 76 S. Ct. at 828.

Similarly in this case, the Georgia Supreme Court's decision involved only its review of a state arbitration under state law, and no substantial federal question was presented, addressed, or otherwise implicated. Accordingly, this Court should deny the Petition for Writ of Certiorari.

II. Petitioners Failed To Raise Or Litigate In The Lower Courts The Issue Of Whether The Georgia Supreme Court Should Have Applied The Federal Arbitration Act To This Proceeding And Thus They Waived Review Of This Issue.

Petitioners did not contend in the Georgia courts, and the Georgia courts did not decide, that the Federal Arbitration Act applied to the dispute. Petitioners did argue in the alternative that under both the Georgia Arbitration Code and the Federal Arbitration Act the arbitration award should be vacated, but they never contended that federal law applied or that it preempted state law. Petitioners did not claim in the Georgia Court of Appeals or before the Georgia Supreme Court that if the Georgia Arbitration Code were applied, it would conflict with the Federal Arbitration Act, nor did they draw into question the validity of the state statute on federal grounds.

Petitioners never asserted that the Federal Arbitration Act applied to the exclusion of the Georgia Arbitration Code even after Respondents' contented, following *Southwire*, that the Georgia Arbitration Code applied. Nor does the record show that the Georgia Supreme Court even considered the question of whether the Federal Arbitration Act preempted the Georgia Arbitration Code or that the Georgia Arbitration Code was somehow contrary to the Federal Arbitration Act.

Ordinarily, the Supreme Court will not decide questions not raised or litigated in the lower courts, especially where the party seeking to argue the issue has failed to object to the point at issue. *See, e.g., City of Springfield, Massachusetts v. Kibbe*, 480 U.S. 257, 94 L. Ed. 2d 293, 107 S. Ct. 1114

(1987). Thus, in *Southland Corp. v. Keating*, 465 U.S. 1, 79 L. Ed. 2d 1, 104 S. Ct. 852 (1984), this Court held that:

> since it does not affirmatively appear that the validity of the state statute was "drawn in question" *on federal grounds* by Southland, this Court is without jurisdiction to resolve this question as a matter of federal law under 28 U.S.C. § 1257(2).

Id. at 9, 104 S. Ct. at 858 (emphasis in original). Similarly, in this case Petitioners did not draw in question the validity of the Georgia Arbitration Code on federal grounds. As such, this Court should not consider this question. For this reason, too, the Petition for Certiorari should be denied.

CONCLUSION

For the foregoing reasons, the Respondents respectfully request that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

PETER H. STROTT
PETER H. STROTT, P.C.
Attorney for Respondents
14th Floor, Candler Building
127 Peachtree Street
Atlanta, Georgia 30303-1810
(404) 222-4340